

**Emigrant Bank v Solimano**

2019 NY Slip Op 34829(U)

July 2, 2019

Supreme Court, Westchester County

Docket Number: Index No. 58709/2016

Judge: Kathie E. Davidson

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER OF THE HONORABLE KATHIE E. DAVIDSON,  
DATED JULY 2, 2019, APPEALED FROM, WITH NOTICE  
OF ENTRY [4 - 19]

FILED: WESTCHESTER COUNTY CLERK 07/30/2019 08:33 AM

INDEX NO. 58709/2016

NYSCEF DOC. NO. 155

RECEIVED NYSCEF: 07/30/2019

FILED: WESTCHESTER COUNTY CLERK 07/03/2019 02:43 PM

INDEX NO. 58709/2016

NYSCEF DOC. NO. 153

RECEIVED NYSCEF: 07/03/2019

To commence the statutory time for  
appeals as of right (CPLR 5513[a]),  
you are advised to serve a copy of  
this order, with notice of entry, upon  
all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
FORECLOSURE TRIAL PART

-----X  
EMIGRANT BANK F/K/A EMIGRANT SAVINGS  
BANK AND NEW YORK PRIVATE BANK AND TRUST,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 58709/2016

Motion date: 6/26/19

LOUIS SOLIMANO A/K/A LOUIS G. SOLIMANO,  
JANICE T. SOLIMANO, JP MORGAN CHASE BANK  
"JOHN DOE #1 through "JOHN DOE #12," the last  
twelve names being fictitious and unknown to the plaintiff,  
the persons or parties intended being the tenants, occupants,  
persons or corporations, if any, having or claiming an interest  
in or lien upon the premises described in the complaint,

Defendants.

-----X  
Davidson, J.

The following documents were read on (1) this motion by Plaintiff Emigrant Bank f/k/a Emigrant Savings Bank and New York Private Bank and Trust (hereafter "Plaintiff") for an order (i) discontinuing or dismissing the instant action without prejudice and (ii) granting such other and further relief as the Court may deem just and proper and (2) this cross-motion by Defendant Janice T. Solimano (now known as Janice Squitieri)(hereafter, "J Solimano") for an order (i) confirming the Referee's Report To Court filed in this action, (ii) amending J Solimano's pleadings to conform to the proof after trial pursuant to CPLR 3025(c) to assert a bar claim cause of action and directing the Westchester County Clerk to mark the subject Mortgage as discharged and (iii) for judgment dismissing the instant action "with prejudice":

Plaintiff's Notice of Motion - Affirmation in Support -Affidavit of Service- Exhibits

Defendant J Solimano's Notice of Cross-Motion - Affirmation in Opposition and In Support  
of Cross-Motion  
Plaintiff's Affirmation in Opposition to Cross-Motion and In Further Support of  
Motion

Upon consideration of all of the foregoing, and for the following reasons, the motion  
and cross-motion are determined as follows:

Procedural Background

The above-captioned action to foreclose on a mortgage on real property located at 1333  
Manor Circle, Pelham, New York 10803 was commenced on June 22, 2016 by the filing of a  
Summons, Complaint and Notice of Pendency via the New York State Courts e-filing system  
(hereafter, "NYSCEF"). According to the Complaint and the Exhibits attached thereto, Plaintiff,  
Emigrant Bank F/K/A Emigrant Savings Bank and New York Private Bank and Trust  
(hereafter, "Plaintiff") is the holder of a Note dated October 23, 2008 which was executed and  
delivered in favor of Emigrant Mortgage Company, Inc. by Defendant Louis Solimano, a/k/a Louis  
G. Solimano in the principal amount of \$675,000.00.

According to the Complaint and Exhibits attached thereto, Plaintiff is the current mortgagee  
of a Mortgage on the subject property located at 1333 Manor Circle in Pelham, New York 10803  
executed on the same date, which Defendants Janice T. Solimano and Louis G. Solimano  
(collectively hereafter, "Solimano Defendants") executed as security for the 2008 subject Note.

According to the Complaint and an Exhibit annexed thereto, the subject Mortgage was  
assigned by Emigrant Mortgage Company, Inc. to Emigrant Savings Bank-Bronx/Westchester, by  
Assignment of Mortgage dated November 2, 2009 (*see* Complaint at ¶6; *see also* Exhibit C to  
Complaint) and recorded with the Westchester County Clerk on August 18, 2016.

Plaintiff alleged that the Solimano Defendants defaulted on the subject Note and Mortgage  
beginning on August 1, 2015 and continuing thereafter, and that the required Notices were mailed  
to said Defendants.

J Solimano appeared in the action by service of an Answer and "Corrected Answer," filed  
via NYSCEF on August 8, 2016, in which she pled general denials and twelve affirmative defenses.

There is no allegation or evidence that any of the other person or entities named as  
Defendants, including Defendant Louis Solimano a/k/a Louis G. Solimano, has appeared or served

a pleading in the above-captioned action.

Plaintiff filed a Request for Judicial Intervention on August 15, 2016 via NYSCEF.

Plaintiff filed a Motion seeking, *inter alia*, summary judgment and an order of reference via NYSCEF on June 21, 2017. J Solimano filed a cross-motion on July 13, 2017 seeking an order granting said Defendant summary judgment.

Plaintiff withdrew its summary judgment motion, without prejudice, by letter filed via NYSCEF on August 18, 2017.

On August 22, 2017 Plaintiff filed its second motion via NYSCEF for an order, *inter alia*, granting Plaintiff summary judgment. J Solimano filed an Affirmation in Opposition and in further Support of Cross Motion via NYSCEF dated September 6, 2017.

By Decision and Order dated and entered November 15, 2017 (Ruderman, J.) the Court denied Plaintiff and J Solimano's respective summary judgment motion and cross-motion.

By Trial Scheduling Order of the Hon. Kathie E. Davidson, Administrative Judge, dated and entered December 15, 2017, this Court directed, *inter alia*, that trial counsel for all parties appear and be ready to commence trial of the above-captioned action on January 10, 2018, and pursuant to rule 4311 and 4320 of the Civil Practice Law and Rules, Court Attorney-Referee Sheila Gabay was appointed to conduct said trial and report to the Court. The parties were advised to consult CPLR 4403 and Uniform Rules for Trial Courts (22NYCRR§202.44) as to the time period for making motions concerning the Report.

CAR Gabay filed her Referee's Report To Court (hereafter, "The Report") on March 27, 2019 with all transcripts of the trial proceedings and exhibits entered into evidence. On April 18, 2019 Plaintiff notified the Referee by email that page four (4) of the thirteen (13) page Referee's Report had inadvertently not been scanned into NYSCEF. By Court Notice uploaded to NYSCEF April 19, 2019, both sides were advised that all pages of The Report had been re-scanned into NYSCEF.

By "Stipulation to Adjourn" filed via NYSCEF on April 23, 2019 Plaintiff's prior counsel, the law firm of Roach and Lin, P.C., and counsel for J Solimano's consented that Plaintiff's motion to Confirm or Reject the Report would be filed on or before April 29, 2019, and Defendant's Opposition or Cross-Motion to Confirm or Reject the Report would be filed by May 30, 2019.

A Consent to Change Attorney was filed by Plaintiff via NYSCEF on April 29, 2019 (the record establishes that Plaintiff's motion to confirm and/or reject The Report was to be served on or before this date pursuant to the parties' April 23, 2019 Stipulation To Adjourn). The Consent to Change Attorney indicated that the law firm of Stagg, Terenzi, Confusione & Wabnik, LLP was substituted in place of the law firm of Roach & Lin, P.C. f/k/a Peter T. Roach & Associates, P.C. as Plaintiff's counsel of record.

By "Stipulation of Adjournment" filed via NYSCEF on May 31, 2019, Plaintiff's motion to discontinue or dismiss the instant action, and J Solimano's cross-motion, returnable on June 5, 2019, were adjourned on consent of the parties to June 26, 2019, and that Plaintiff's opposition to cross-motion was to be served on or before June 11, 2019.

Plaintiff has not filed a motion to confirm or reject The Report. Rather, on May 3, 2019, Plaintiff's present counsel of record, the law firm of Stagg, Terenzi, Confusione & Wabnik, LLP, made the instant motion for an order discontinuing or dismissing the instant action without prejudice and for other and further relief. J Solimano made the instant cross-motion for an order conforming the pleadings to the proof and adding a bar cause of action (counterclaim) to Defendant's Answer on May 29, 2019. In her cross-motion, J Solimano also makes application that judgment be entered dismissing this action "with prejudice," and that The Report of the Referee be confirmed by this Court pursuant to 22 NYCRR §202.44. On June 11, 2019 Plaintiff filed an Affirmation in Opposition to Cross-Motion and in Further support of Motion to Discontinue or Dismiss Without Prejudice. The motion and cross-motion were deemed fully submitted on June 26, 2019, pursuant to the parties' May 31, 2019 Stipulation.

#### Referee's Report To Court

According to the Report:

On January 10, 2018 the following attorneys appeared and the trial commenced:

PETER T. ROACH & ASSOCIATES, P.C.  
Attorneys for Plaintiff  
6901 Jericho Turnpike, Suite 240  
Syosset, New York 11791  
By: Michael C. Manniello, Esq.

CLAIR & GJERTSEN, ESQS.  
Attorneys for Defendant Janice T.  
Solimano  
4 New King Street  
White Plains, New York 10604  
By: Ira Clair, Esq., Mary Aufrecht, Esq. and  
Lance Colquitt, Esq.

When the case was called on January 10, 2018 both sides announced they were ready to proceed. At the conclusion of the January 10, 2018 proceedings the trial was continued to January 16, 2018.

On January 16, 2018 Plaintiff gave an opening statement and counsel for J Solimano waived same.

Plaintiff called one witness, Judith Every (hereafter, "Every"), who testified, *inter alia*, that she has been employed by Emigrant Mortgage Company, Inc. as "First Vice President, that she was employed by Plaintiff in the same capacity, that she has been employed by Emigrant for 18 years, that she "oversee[s] the collection and customer service area and the "running the day-to-day operations for both departments" and was "previously in charge of the foreclosure area" and that Emigrant Mortgage Company, Inc. is the servicing agent for Plaintiff Emigrant Bank (*see* 1/16/18 Tr. at 2-23).

Defendant J Solimano's counsel made application that Ms. Every's testimony be precluded at trial on the grounds that her name had not been disclosed in response to said Defendant's discovery request. This Referee denied J Solimano's counsel's preclusion application, noting that a motion to preclude had not been made prior to or during trial by said Defendant.

During Every's testimony the following document was offered for admission into evidence, and not admitted by this Referee, subject to the Court's determination as to its admissibility and weight:

Pl. Ex. 1—copy of "SubServicing Agreement" between "Emigrant Mortgage Company, Inc." and "Emigrant Bank," marked for identification only and not admitted into evidence by this Referee on the grounds of hearsay.

At the conclusion of the proceedings on January 16, 2018 the trial was continued to March 12, 2018. Counsel for Defendant J Solimano made application for a continuance of the trial, which application was consented to by Plaintiff's counsel. This Referee found that good cause existed and continued this trial, on consent of both sides, to March 26, 2018.

On March 26, 2018 both sides appeared and stated they were ready to proceed. During Every's testimony the following documents were offered for admission into evidence, and were admitted by this Referee, subject to the Court's final determination as to admissibility and weight:

Pl. Ex. 2– copy of “New York State Department of Financial Services” “Restated Organization Certificate” providing for change of name from “The Emigrant Industrial Savings Bank” to “Emigrant Bank” with raised seal, dated February 26, 2018, admitted over objection.

Pl. Ex. 3 – copy of “State of New York Department of Financial Services” “Certificate of Effectiveness” with certification and official seal, dated February 23, 2018, admitted without objection.

Pl. Ex. 4A – (original Note deemed Pl. Ex. 4 )– copy of “Adjustable Rate Note” dated October 23, 2008 between “Lender” “Emigrant Mortgage Company, Inc.” and “Borrower” “Louis G. Solimano,” for property located at “1333 Manor Circle, Pelham, New York 10803-3519” in the amount of “\$675, 000.00, admitted into evidence over objection.

At the conclusion of the proceedings on March 26, 2018 the trial was continued to May 29, 2018. During Every’s testimony on that date the following documents were offered for admission into evidence and admitted by this Referee without objection, unless otherwise noted, subject to the Court’s final consideration as to admissibility and weight:

Pl. Ex. 5 – document identified as “original Mortgage”, marked for identification only, and not admitted into evidence based upon hearsay rule.

Pl. Ex. 6–certified copy of “Mortgage” with attached “Rider” between “Lender” “Emigrant Mortgage Company, Inc.” and “Borrowers” Louis G. Solimano” and “Janice T. Solimano,” dated October 23, 2008 for property located at 1333 Manor Circle, Pelham, New York 10803-3519, with attached “Westchester County Recording and Endorsement Page.”

Pl. Ex. 7A–(original “SubServicing Agreement” with “Amendments” between “Emigrant Mortgage Company, Inc.” and “Emigrant Bank” deemed Pl. Ex. 7)  
Copy of “Lease and Administrative Files Transmittal Form”and attached “Subservicing Agreement” with attached Amendments, admitted over objection.

At the conclusion of the proceedings on May 29, 2018 the trial was continued to August 14, 2018 for the continuation of Every’s testimony.

During Every’s testimony, the following documents were offered for admission into evidence and admitted by this Referee subject to the Court’s final consideration as to admissibility and weight:

Pl. Ex. 8 – copy of a contractual Demand Letter addressed to “Janice T. Solimano” and “Louis G. Solimano” at address of “150 Mount Tom Road, Pelham, New York, 10803-3309” dated October 2, 2015 “via certified and regular mail”, admitted over objection.

Pl. Ex. 9A– (original 90-Day Notice of Default deemed Pl. Ex. 9)– copy of a 90-Day Notice of Default dated October 2, 2015, addressed to “Janice T. Solimano” and Louis G. Solimano” at address of 150 Mount Tom Road, Pelham New York 10803-3309 “via Certified and Regular Mail,” admitted over objection.

Pl. Ex. 10A – (original deemed as Pl. Ex. 10) –copy of document entitled “Firm Mailing Book for Accountable Mail,” admitted over objection.

Pl. Ex. 11 – copy of “PS Form 3877,” admitted over objection.

Pl. Ex. 12A– (unredacted copy marked as Pl. Ex. 12) – redacted copy of “New York State Department of Financial Services Proof of Filing Statement” for “Louis Solimano,” admitted over objection.

Pl. Ex. 13A- (unredacted copy marked as Pl. Ex. 13)– redacted copy of “Proof of Filing Statement” for “Janice T. Solimano,” admitted over objection.

Pl. Ex. 14A -(unredacted copy marked at Pl. Ex. 14)– redacted copy of “Mortgage Prior History” for Janice T. Solimano, admitted over objection.

At the conclusion of the proceedings on August 14, 2018 the trial was continued to September 6, 2018. On that date the trial both sides consented to continue the trial to September 7, 2018. This Referee found that good cause existed to the continue the trial until the next day on September 7, 2018.

On September 7, 2018 the following document was offered into evidence and admitted by this Referee during Every’s testimony, subject to the Court’s final consideration as to weight and admissibility:

Pl. Ex. 15A – (original marked as Pl. Ex. 15) - copy of “Lease and Transmittal Form” with attached “First Amendment to Subservicing Agreement” between “Emigrant Mortgage Company, Inc.” and “Emigrant Savings Bank”, admitted over objection.

At the conclusion of the proceedings on September 7, 2018, the trial was continued to November 29, 2018.

During the proceedings on November 29, 2018 the following documents were admitted into evidence by this Referee, subject to the Court’s final determination as to admissibility and weight:

Pl. Ex. 16C– (original marked as Pl. Ex.16) – copy of “Lease and Administrative Files Transmittal Form” with attached “Second Amendment to Subservicing Agreement” between



"Emigrant Mortgage Company, Inc." and "Emigrant Savings Bank," admitted over objection.

Pl. Ex. 17C- (original marked as Pl. Ex. 17)- copy of "Lease and Administrative Files Transmittal Form" with attached "Third Amendment to Subservicing Agreement," admitted over objection.

Pl. Ex. 18B-(original marked as Pl. Ex 18)-copy of "Lease and Administrative Transmittal Files Transmittal Form" with attached "Fourth Amendment to Subservicing Agreement," admitted over objection.

Pl. Ex. 19- copy of multi-page document identified as an "Excel Spread Sheet," admitted over objection.

At the conclusion of the proceedings on November 29, 2018 the trial was continued to and concluded on November 30, 2018.

During Every's testimony on November 30, 2018 the following document was admitted into evidence by this Referee, subject to the Court's final determination as to admissibility and weight:

Pl. Ex. 20- certified copy of "Assignment of Mortgage" between "Assignor" "Emigrant Mortgage Company, Inc. "in favor of Emigrant Savings Bank-Bronx/Westchester", "given to secure payment of \$675,000 due November 1, 2038", conveying a "Mortgage dated October 23, 2008 made and executed by "Louis Solimano," "together with the note(s) and obligations therein described and the money due and to become due thereon with interest," with Westchester County Recording and Endorsement page, recorded on August 18, 2016, admitted over objection.

At the conclusion of Every's testimony on November 30, 2018 Plaintiff made application for a continuance of the proceedings in the late afternoon in order to present an additional witness. Defendant's counsel objected to Plaintiff's application on the grounds that his witness had been in the courthouse all afternoon and waiting to testify. This Referee denied Plaintiff's request for a continuance. Plaintiff counsel noted his objection on the record.

Plaintiff stated it rested its case.

Counsel for J Solimano moved for judgment as a matter of law pursuant to CPLR 4401, specifying the grounds for said motion, which motion this Referee refers to the Court for determination.

J Solimano testified as a witness in support of her case. J Solimano stated her name on the record as "Janice Squitieri," and testified, *inter alia*, that she and Defendant Louis Solimano were

divorced in July 2018, that divorce proceedings had begun in July 2012, that Louis Solimano had moved out of the subject property in July 2012, and that the address of her primary residence is 150 Mount Tom Road, New Rochelle, New York.

Plaintiff did not cross-examine J Solimano a/k/a Squitieri.

At the conclusion of J Solimano a/k/a Squitieri's testimony counsel for J Solimano stated he rested.

Counsel for both Plaintiff and J Solimano both submitted a written post-trial Memorandum of Law in lieu of making closing arguments, which was dated and filed via NYSCEF on February 22, 2019.

Certified copies of the transcripts of the trial minutes and copies of the Exhibits offered for admission into evidence were filed with the Report by uploading to NYSCEF. Copies of all trial transcripts were received by the Referee as of February 22, 2019.

#### Findings of Fact and Conclusions of Law

This Court will first consider Plaintiff's motion for an order discontinuing or dismissing the instant action without prejudice.

As an initial matter, Plaintiff's argument in support of its motion that the Referee's Report "recommended" the instant action be discontinued or dismissed without prejudice, is unavailing, misplaced and not supported by the record (*see* Pl's Affirmation in Opposition in Support at ¶ 2). Rather, a review of The Report shows the Referee stated the following: "This Referee recommends that Defendant J Solimano's motion for judgment should be granted as against Plaintiff on Plaintiff's cause of action for foreclosure" (*see* Referee's Report to Court, page 13, second paragraph). The Referee did not recommend the instant action be discontinued or dismissed, let alone without prejudice.

Plaintiff's motion for an order discontinuing or dismissing the instant action with prejudice is denied. Pursuant to CPLR 3217, once a responsive pleading has been served, and the case has been submitted to the court, a plaintiff may not discontinue an action voluntarily except by court order. Further, "[a]fter the case has been submitted to the court, a plaintiff may not discontinue an action voluntarily except by court order. Further, "[a]fter the case has been submitted to the court or jury to determine the facts the court may not order an action discontinued except upon stipulation of all

parties appearing in the action” (CPLR 3217[b]). In other words, once a case has been submitted to the court to determine the facts, discontinuance requires both a court order and a stipulation.

It has been held that the requirement for both a court order and a stipulation also applies once the case has been submitted to a referee who is appointed to hear and determine (*see, e.g., Getz v Silverstein, Inc.* 205 Misc. 431, 432 (N.Y. City Ct. 1954]). And where a referee has been appointed to hear and report, “the submission of the referee’s report to the court would probably be the terminal point” (David D. Siegel, *Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3217:11*). Particularly where, as here, the plaintiff neither moves to reject or opposes a motion to confirm the Report.

Thus, in the above-captioned action, the case was submitted to this Court to determine the facts within the meaning of CPLR 3217 (b) upon the filing of the Referee’s Report on March 27, 2019. J Solimano has not stipulated to discontinuance of this action. Therefore this Court may not issue an order doing so.

Even assuming, *arguendo*, that the case had not been submitted to this Court within the meaning of the statute, so that a stipulation was not required, Plaintiff motion is still denied. “A plaintiff should not be permitted to discontinue an action without prejudice for the purpose of avoiding an adverse order of the court” (*Casey v Custom Crushing and Materials*, 309 AD2d 726, 727 [2d Dept 2003]; *see also Baez v Parkway Mobile Homes, Inc.*, 125 AD3d 905, 908 [2d Dept 2015]), such as “[w]here the discontinuance is sought so as to escape an imminent trial loss” (*Cooper v Cooper*, 103 Misc. 2d 689, 694 [Sup Ct., N.Y. Co. 1980]; *see also Turco v Turco*, 117 AD3d 719, 721 [2d Dept 2014]). The record - including Plaintiff’s decision to move to discontinue rather than to reject the Report - establishes that Plaintiff is attempting to avoid an imminent loss after trial.

Therefore, Plaintiff’s motion for an order discontinuing or dismissing the above-captioned action is denied.

J Solimano has cross-moved to confirm The Report. Plaintiff has not moved to reject the Report. Upon consideration of the testimony and exhibits admitted at trial and the documents submitted in support of the instant cross-motion, and for the following reasons, the cross-motion for an order confirming the Report is granted. J Solimano’s allegations in support of her motion

concerning the conduct of the trial, the testimony taken and the evidence offered and admitted thereat, are consistent with the representations in the Report as well as this Court's findings upon consideration of all of the said testimony, evidence and submission. The findings of fact and conclusions of law contained in the Report are consistent with this court's findings and conclusions offered at trial, and are incorporated herein.

The motion of J Solimano at trial for judgment as a matter of law is granted.

Pursuant to CPLR 4401:

Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue.

Grounds for the motion shall be specified.

J Solimano specified the grounds for her motion at trial. J Solimano argued that Plaintiff failed to establish an agency relationship existed between Emigrant Mortgage Company, Inc. and the Plaintiff, necessitating that Plaintiff's witnesses' testimony be stricken; that Plaintiff did not establish standing to commence the instant action; and Plaintiff failed to establish its compliance with RPAPL 1304 and Paragraph 22 of the subject Mortgage.

Plaintiff failed to establish it had satisfied the condition precedents under RPAPL 1304 and paragraph 22 of the subject mortgage, Plaintiff failed to establish it had standing to commence this foreclosure action, and Plaintiff failed to present any evidence at trial, such as a Limited Power of Attorney, establishing an agency relationship existed between Plaintiff's sole witness and the Plaintiff.

Thus, the motion for judgment as a matter of law in favor of J Solimano is granted.

Therefore, the Court confirms the Report and finds that Defendant J Solimano is entitled to judgment in her favor on Plaintiff's cause of action for foreclosure.

J Solimano has also cross-moved for an order pursuant to CPLR 3025(c) amending the pleadings to the proof after trial to assert a bar claim cause of action [counterclaim] in said Defendant's Answer discharging the mortgage of record. Counsel for J Solimano argues said amendment after trial would "save judicial resources to include a decretal paragraph in the judgment directing the Westchester County Clerk to mark the mortgage which is the subject of this action as

discharged for same is not enforceable via the application of res judicata” (see Defendant’s Affirmation in Opposition and in Support of Cross-Motion, pp. 4-5).

In support of this branch of her cross-motion, J Solimano further argues that a separate bar claim is not required because CPLR 3025(c) permits an Answer to be conformed to the evidence at trial. Plaintiff opposes this application for the following reasons: “it is not a legally cognizable claim due to the undisputed fact that the statute of limitations has not expired as mandated by RPAPL1501, that to date, J Solimano did not allege any counterclaims in her Answer, the Referee’s Report does not cancel or extinguish the mortgage on the premises, there is no legal or contractual basis to discharge the mortgage, and the Referee’s findings do not dismiss the action with prejudice on the merits (see Affirmation in Opposition to Cross-Motion at ¶ 6).

Pursuant to CPLR 3025(c), a trial court may permit the amendment of pleadings before or after judgment to conform them to the evidence “upon such terms as may be just” (see *Kimso Apts., LLC v Gandi*, 24 NY3d 403). Such an amendment is permissible “even if the amendment substantially alters the theory of recovery” (*Kimso Apts. LLC v Gandi*, 24 NY3d 403). J Solimano seeks to conform the pleadings to the proof after trial and after the Referee’s Report to Court was filed, to assert a counterclaim discharging and canceling the Plaintiff’s mortgage.

RPAPL 1501 provides as follows in relevant part:

“[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage... has expired, “any persons with an estate or interest in the property *may maintain an action* “to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom” (emphasis added).

J Solimano’s application for an order conforming the pleadings to the proof at trial to include a counterclaim to cancel and discharge the mortgage pursuant to RPAP 1501 is denied.

First, a motion is not the proper vehicle for a mortgagor to cancel and discharge a mortgage, as RPAPL 1501(4) only authorizes an aggrieved mortgagor to “maintain an action ...to secure the cancellation and discharge of such encumbrance” *Deutsche Bank Nat. Trust Co. v Gambino*, 153 AD3d 1232 (2d Dept 2017). The request to cancel and discharge a mortgage in a foreclosure action can only be sought by action and not by motion (see RPAPL 1304(4); see also *Kashipour v*

*Wilmington Sav. Fund Society, FSB*, 144 AD3d 985).

Leave to amend a pleading “shall be freely given,” in the absence of surprise or prejudice (CPLR 3025(b)). Plaintiff argues that J Solimano first sought this relief several months after the Referee’s Report to Court was filed and proffered no reason for the delay in moving to assert this counterclaim. As such, Plaintiff had no opportunity to present defenses to the counterclaim.

Additionally, “a successful Article 15 claim must set forth facts showing (i) the nature of the plaintiff’s interest in the real property and the source of this interest, (ii) that the defendant claims an interest in the property adverse to that of the plaintiff, (iii) whether any defendant is known or unknown; or incompetent, and (iv) whether all interested parties are named” *Guiccione v Estate of Guiccione*, 84 AD3d 867 (2d Dept 2011). At trial, the Referee did not report that any evidence was presented, nor do J Solimano’s moving papers allege, demonstrating that “the period allowed by the applicable statute of limitation has expired, and that the other elements required under Article 15 of the RPAPL were established, so as to entitle J Solimano to recover on this cause of action. The Referees Report did not find or recommend that the subject mortgage on this action was invalid.

Therefore, the branch of J Solimano’s cross-motion for an order conforming said Defendant’s pleadings to the proof to assert a bar claim, and upon same, that the judgment contain a decretal paragraph discharging the mortgage of record, is denied.

The branch of J Solimano’s application for the instant case to be dismissed “with prejudice” is denied as academic.

Plaintiff’s application for such other and further relief is denied.

Accordingly, and for the foregoing reasons, it is hereby

ORDERED that the motion of Plaintiff Emigrant Bank f/k/a Emigrant Savings Bank and New York Private Bank and Trust for an order discontinuing or dismissing the instant action without prejudice is denied, and it is further

ORDERED that the cross-motion of Defendant Janice T. Solimano, also known as Janice Squitieri, to confirm the Referee’s Report to Court filed by Court Attorney-Referee Sheila Gabay is granted, and it is further

ORDERED that the motion of Defendant Janice T. Solimano, also known as Janice Squitieri, pursuant to CPLR 4401 for judgment as a matter of law is granted, and it is further

**FILED: WESTCHESTER COUNTY CLERK 07/30/2019 08:33 AM**

INDEX NO. 58709/2016

NYSCEF DOC. NO. 155

RECEIVED NYSCEF: 07/30/2019

**FILED: WESTCHESTER COUNTY CLERK 07/03/2019 02:43 PM**

INDEX NO. 58709/2016

NYSCEF DOC. NO. 153

RECEIVED NYSCEF: 07/03/2019

ORDERED that judgment should be entered in the above-captioned action in favor of Defendant Janice T. Solimano, on the cause of action for foreclosure as against Plaintiff, Emigrant Savings Bank f/k/a Emigrant Savings Bank and New York Private Bank and Trust, and it is further

ORDERED that the branch of Defendant Janice T Solimano's cross-motion for an order granting judgment to said Defendant "with prejudice" is denied as academic, and it is further

ORDERED that the branch of Defendant Janice T Solimano's cross-motion for an order pursuant to CPLR 3025(c) conforming the pleadings to the proof after trial to assert a bar claim, and that the Judgment contain a decretal paragraph discharging the subject Mortgage is denied, and it is further

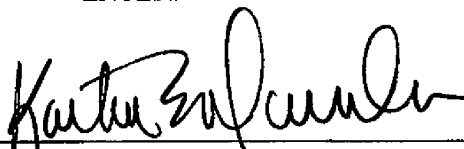
ORDERED that Defendant Janice T. Solimano shall, within ten days after entry hereof, serve upon Plaintiff and all Defendants a copy of this Decision and Order with Notice of Entry, and it is further

ORDERED that Defendant Janice T. Solimano shall within ten days after the filing of proof of service of a copy of this Decision and Order with Notice of Entry as aforesaid, serve upon Plaintiff and all Defendants and file with the court a proposed Judgment with Notice.

Counsel are hereby advised that they may pick up their documents which were admitted into evidence at trial by contacting the Clerk of the Foreclosure Trial Part at 914-824-5268 within the next thirty (30) days; unclaimed documents will not be kept by the Foreclosure Trial Part clerk after thirty days.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



HON. KATHIE E. DAVIDSON  
Justice of the Supreme Court

Dated: White Plains, New York  
July 2, 2019